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No. 06-637

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

v.

TOM F. on behalf of GILBERT F., a minor child,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Does the holding of the United States Court of Appeals for the Second Circuit, stating that the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency, stand in direct contradiction to the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes tuition reimbursement to the parents of a disabled child "who previously received special education and related services under the authority of a public agency"?

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The Opinion and Order of the United States Court of Appeals for the Second Circuit in the matter of *Frank G. v. Board of Education of Hyde Park* is reported at 459 F.3d 356 (2d Cir. 2006). App. 77a.[1]

The Summary Order of the United States Court of Appeals for the Second Circuit in the matter of *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F.* is reported at 193 Fed. Appx. 26 (2d Cir. 2006). Pet. App. A14.[2]

The Memorandum Decision of the United States District Court for the Southern District of New York in the matter of *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F.* is reported at 2005 U.S. Dist. LEXIS 49 (S.D.N.Y. 2005). Pet. App. A1.

JURISDICTION

The United States Court of Appeals for the Second Circuit vacated the Judgment of the United States District Court for the Southern District of New York on August 9, 2006. Pet. App. A15. The Petition for a Writ of Certiorari was filed on November 6, 2006 and was granted on February 26, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At issue in this case is the interpretation and application of 20 U.S.C. § 1412(a)(10)(C)(ii). The relevant implementing regulation is 34 C.F.R. § 300.403(C).

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[1] The Joint Appendix, filed with this brief, is referred to as "App." followed by the page number.

[2] The Appendix to Petition for Writ of Certiorari, filed on November 3, 2006, is referred to as "Pet. App." followed by the page number.

STATEMENT OF THE CASE

I. Statutory Background.

This case presents the question of whether the Individuals with Disabilities Education Act ("IDEA") permits tuition reimbursement where a child has been unilaterally placed in private school by the parent and the child has not previously received special education or related services from a public agency.

The IDEA is a funding statute enacted pursuant to Congress's spending power.[3] *Arlington Central School District Board of Education v. Murphy*, __ U.S. __, 126 S.Ct. 2455, 2458 (2006). The IDEA ensures that all children with disabilities are given access to a free and appropriate public education ("FAPE"). 20 U.S.C. §§ 1400 *et seq.*

The IDEA authorizes federal financial assistance to States and to local school systems to ensure that the nation's disabled students have access to the public schools, and requires school systems to make FAPE available to all children with disabilities in their jurisdiction. 20 U.S.C. § 1412(a)(1). One of the congressional intents is to encourage mainstreaming of students wherever practicable. In exchange for federal financial assistance under the IDEA, Congress requires that States meet specified requirements in order to ensure compliance with the purpose of the statute.

[3] The IDEA was amended by the Individuals with Disabilities Education Improvement Act of 2004 ("IDEIA"), Pub. L. No. 108-446, 118 Stat. 2647 (Dec. 3, 2004), which went into effect on July 1, 2005. As the events pertaining to this case took place prior to the effective date of the IDEIA, all statutory citations refer to the IDEA, as codified prior to the enactment of the IDEIA.

Compliance with the statute is assured by provisions that permit the withholding of federal funds upon a determination that a participating state or local agency has failed to satisfy the requirements of the IDEA. 20 U.S.C. §§ 1414(b)(2)(A), 1416.

FAPE is defined to include special education and related services that "(a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the [state education agency], including the requirements of this part; (c) include preschool, elementary school, or secondary school education in the State; and (d) are provided in conformity with an individualized education program ("IEP") that meets the requirements of §§ 300.340 – 300.350."[4]

The Court has noted that special education means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions. § 1401(16)." The Court further noted that related services are defined as "transportation, and such developmental, corrective, and other supportive services . . . as may be required to assist a handicapped child to benefit from special education. § 1401(17)." *Board of Education of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 188 (1982).

The Court has described an IEP as "a comprehensive statement of the educational needs of a handicapped child

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[4] 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 300.121(a); 34 C.F.R. § 300.13. *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 367 (1985).

and the specially designed instruction and related services to be employed to meet those needs (citation omitted)" and has noted that an IEP "is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child." *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 367-68 (1985).

Under the IEP process, State educational authorities must identify and evaluate disabled children, §§ 1414(a)-(c), develop an IEP for each disabled child, § 1414(d)(2), and review every IEP at least once a year, § 1414(d)(4). Every IEP must include an assessment of the child's current educational performance, must articulate measurable educational goals, and must specify the nature of the special services to be provided by the school. § 1414(d)(1)(A). In New York State, the IEP is produced by a Committee on Special Education, whose members are appointed by the board of education or trustees of the school district. *See* N.Y. Educ. Law § 4402(1) (McKinney Supp. 2005).

If a state that receives IDEA funding fails to provide a child with FAPE, the parent may remove the child to an appropriate private school, and may seek retroactive tuition reimbursement. *Burlington Sch. Comm. v. Dep't of Educ.*, *supra*, 471 U.S. at 369-70 (noting that parents who unilaterally change their child's placement while administrative review proceedings are pending do so at their own financial risk). A court or hearing officer may award tuition reimbursement if it finds: (1) that the proposed IEP was inadequate to afford the child an appropriate public education, and (2) the private education services obtained by the parents were appropriate to the child's needs; and

(3) the child previously received special education services from a public agency.[5] *M.S. v. Board of Education of the City School District of Yonkers*, 231 F.3d 96, 102 (2d Cir. 2000).

To meet its goals, the IDEA requires that states receiving federal funds offer parents of a disabled student an array of procedural safeguards designed to help ensure the education of the child. Under the IDEA, a parent may present complaints regarding any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. 20 U.S.C. § 1415(b)(6). Under the applicable provisions of New York State law, the parents involved in such a complaint have an opportunity for an impartial due process hearing, conducted by a hearing officer appointed by the local board of education. 20 U.S.C. § 1415(f)(1), N.Y. Educ. Law § 4404(1) (McKinney Supp. 2005).

Except under limited circumstances, the IDEA does not require local school districts to pay for tuition at a private school. A local school district is not required to pay for the cost of education of a child with a disability at a private school or facility if the school district made FAPE available to the child and the parents chose to place the child in the private school or facility. Generally, "no private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a).

Parents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the child's private placement do so at their own peril, as there

[5] 20 U.S.C. § 1412(a)(10)(C).

is no guarantee that they will win. *Burlington*, *supra*, 471 U.S. at 374. Reimbursement is permitted only where it is determined after a hearing that the services offered by the school district are inadequate or inappropriate, the services chosen by the parents are appropriate, and equitable considerations support the parents' claim. *See* 20 U.S.C. § 1412(a)(10)(C)(ii)[6]; 34 C.F.R. § 300.403(C).

II. Factual Background.

Tom F. ("respondent") is the parent of a child, Gilbert F., who resides in petitioner's School District. The student, who was born on October 1, 1989, has never received special education services from the New York City Department of Education ("Board") or any other public agency (A5, A238, A243-244).[7] Since the time that the student was eligible to receive public education in 1995, the student attended the Stephen Gaynor School ("Gaynor"), a private school which is not approved by the Commissioner of Education of the State of New York for the provision of special education services to students with disabilities (A5). Prior to Gaynor, the student attended Washington Market School, a pre-kindergarten private school (A243).

The student was initially referred to be evaluated by the Board's Committee on Special Education ("CSE") where annual evaluations are conducted and IEPs are promulgated. The student was found to be learning disabled (A175) and received annual evaluations by the CSE in 1997 and 1998. Both times, respondent refused the recommended public

[6] This subsection of the IDEA has not been modified since the 1997 Amendments.

[7] Numbers in parentheses preceded by the letter "A" refer to pages in the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

placement and services and, instead, sued the Board for tuition reimbursement under *Florence County Sch. Dist. Four et al. v. Carter*, 510 U.S. 7 (1993), alleging procedural violations. Each time the Board elected to settle for purposes of avoiding litigation, and agreed, *inter alia*, to reimburse appellant for the cost of the student's tuition at Gaynor (A5-11, A14-20). In neither case was the issue of placement ever reached.

The CSE scheduled the IEP review for May 28, 1999, but the review was postponed due to the unavailability of a parent member (App. 70a). A parent member (*i.e.*, an additional parent of a student with a disability residing in the school district) is a required IEP team member under New York State law, and failure to include the parent member would invalidate the IEP under current SRO precedent. The attendance of a parent member may be completely waived by the parent, but respondent chose not to do so.

The student's annual review was delayed until the CSE reconvened on June 23, 1999, and conducted the annual review of the student's appropriate educational placement for the 1999-2000 school year (A55-57). Before the annual review was to take place, Gaynor informed the CSE that the school would be closed on June 23rd but that the school staff would be present at the school (A54-55).

Seven people attended the CSE meeting, including respondent parent, a law clerk from the office of the parent's attorney, the district representative from the Board, an educational evaluator from the Board who was asked to serve as the special education teacher, the Board's general education teacher, a parent member, required by State

regulation and funded by the Board, and a school psychologist from the Board (A74, A150). The CSE attempted to contact the student's private school special education teacher from Gaynor during the annual review, in the hope that the special education teacher could participate, but the CSE was advised that no one from Gaynor was available to participate (A66-67). The student's special education teacher was in the hospital and was not in attendance at the school on June 23rd. (Pet. App. 2, A279).

Since the child's actual special education teacher at Gaynor was unavailable to participate at the CSE review, the CSE educational evaluator served in the role of the special education teacher for purposes of the review (A74). The educational evaluator believed that a Modified Instructional Services-I ("MIS-I") program was appropriate for the student because he would benefit from multi-motor methods of instruction (A110-111). At the review, the educational evaluator described the proposed MIS-I program for respondent (A140).

The CSE team developed an IEP for the child after completing a review of the child's speech and language evaluation, a midyear progress report, a psychological evaluation, an educational evaluation, and an occupational therapy evaluation (App. 66a-71a, A86-89, A93). It was recommended that the student continue to be classified as learning disabled and be placed in a MIS-I program with a teacher ratio of 15:1 (App. 70a). The CSE additionally recommended that the student receive speech/language therapy in a group twice per week, and counseling in a group once per week (App. 70a).

The student's Final Notice of Recommendation, recommending the student's placement at the New York City Lower Lab School for Gifted Education, was sent to respondent on July 29, 1999 (App. 70a, A147). Respondent never visited the school, never met with any representatives from the school, and never met with the placement officer at the CSE (A238, A247). At the impartial hearing, respondent testified that if the Board offered the child a placement prior to the end of the 1998-1999 school year, he would have observed the placement (A237).

Respondent acknowledged that he has never visited any public school placement that the CSE has offered the student in the past (A238). Respondent testified that he had already decided to again enroll the student at Gaynor and had tendered a payment to Gaynor. When asked whether he had looked at the MIS I program that the Board recommended, respondent replied, "Well, it was sort of a moot point. We were gone for the summer. I spent the summer in California. Plans had been made for the following year. The down payment had been made . . . ." (A247).

Respondent rejected the placement at the New York City Lower Lab School for Gifted Education, and chose instead to continue the student's education at Gaynor for the 1999-2000 school year. Respondent thereafter brought an administrative complaint against the Board, requesting an impartial hearing seeking tuition reimbursement for his unilateral placement of the student in the Gaynor School for the 1999-2000 year (App. 70a). The student's tuition at Gaynor for the 1999-2000 school year was $21,819.

III. Procedural History.

The impartial hearing was held on January 21, January 31 and February 29, 2000, before an Impartial Hearing Officer ("IHO"), and eight witnesses testified (App. 16a-38a). Testifying on behalf of the Board were the Special Education Teacher of the student's recommended MIS-I program at the New York City Lower Lab School for Gifted Education, the CSE School Psychologist, and the CSE Educational Evaluator. Respondent testified on his own behalf, along with respondent's attorney's Law Clerk, Gaynor's Head Teacher, Gaynor's Speech and Language Pathologist, and Gaynor's Reading Teacher.

In developing the IEP, the CSE conducted the student's educational evaluation, the social history report, speech and language evaluations (which included a consideration of the speech and language evaluation conducted the prior year), an occupational therapy assessment and a psychological report. The CSE also performed an observation at the private school. The CSE also considered the private school progress reports submitted by Gaynor (A171-173, A175-192, A200-222). The parent brought in a two-page medical evaluation, which the CSE considered (A223). The CSE additionally considered a psychological evaluation conducted on or about April 10, 1999, which indicated that the student is friendly, pleasant and quiet (A46-48, A193-194).

The psychologist who conducted the student's classroom observation testified that with regard to intellectual testing, the student did not demonstrate any relative weaknesses, and demonstrated relative strengths in the area of verbal abstract reasoning and his general fund of information and being able to sequence (A47-48). The psychologist testified that the

student scored below average in perceptual motor development, and on his emotional tests demonstrated needs in the areas of self-confidence and self-esteem (A47).

The psychologist stated that the psychological evaluation findings were consistent with the Gaynor mid-year teacher report (A12). With respect to the child's classroom observation, the psychologist testified that the student participated in the class activities, appeared appropriate in his group and appeared to be quite attentive to what was going on in the class (A16, A78-79). The psychologist was of the view that the student needed a self-contained class where issues of attention and academic weaknesses could be addressed (A50). The psychologist also recommended counseling to address the child's self-confidence and self-esteem issues (A50-51).

The special education teacher of the recommended MIS-I class at the New York City Lower Lab for Gifted Education ("MIS-I teacher") is board certified in the areas of elementary education and special education, has taught special education for approximately five years, and has taught special education in a MIS-I classroom for two years (A316). The MIS-I teacher familiarized herself with the student by studying the student's IEP (A316). The MIS-I teacher testified that the proposed class had the capacity for fifteen students, but had only nine students registered at the time of the impartial hearing (A318-320).

Describing the CSE's proposed placement, the MIS-I teacher noted that the children's reading levels range from high kindergarten level to high third grade, and that their math levels range from high kindergarten to fourth grade (A319, A336). The MIS-I teacher testified that to address

the range of reading levels, she practices private reading and has individualized reading groups based upon a student's instructional reading levels (A321). She additionally advised that the reading program is a balanced literacy program and includes the following daily activities: reading aloud, interactive writing, shared reading, guided reading, and a writer's workshop (A320-321).

The MIS-I teacher explained that in math, the majority of students in the proposed class were functioning between the 2nd and 3rd grade level, with one child functioning at the fourth grade level (A320). She said that the child who was functioning at the fourth grade level was mainstreamed for math in a general education class (A328, A336-337).

In describing the math curriculum, the MIS-I teacher testified that she administers the Turk program, a hands-on curriculum where children work individually or in pairs to solve problems and thereafter meet in a circle to discuss strategies used and different strategies available in solving the problems (A324, A337). Based upon her review of the child's IEP, the MIS-I teacher felt that the student would fall at the higher end of her class academically, but also noted that there are other children in her class who are at the student's academic level (A326). Based upon her review of the child's IEP, the MIS-I teacher believed that the CSE's recommended placement was appropriate (A329).

The educational evaluator, who also served as the special education teacher, advised at the CSE meeting that she was familiar with the student and viewed all of the student's records at the review (A96). She testified that the child's educational problems were greatest in the area of reading, and particularly in reading comprehension (A97, A99).

In particular, the student's reading comprehension score was grade equivalent to 2.5 and his decoding score was equivalent to 3.5 (A203). She stated that, on the other hand, the student's strongest area was math, where his math computation score was grade equivalent to 4.2 and his math application was grade equivalent to 3.6 (A100, A203).

The educational evaluator testified that the CSE team recommended speech and language therapy services because the student's listening comprehension and oral narrative skills were below average, despite the fact that the student's speech and language evaluator did not recommend the services (A105-107). She testified that the MIS-I program's use of multi-sensory methods of instruction would be appropriate to meet the child's demonstrated learning disability, and further advised that the MIS-I's smaller class size and trained special education teacher were necessary to address his attention issues (A109-111).

The educational evaluator testified that the child should be with non-disabled peers during non-academic activities and took the view that a self-contained private school environment would be too restrictive for the child (A111-112).

Respondent acknowledged that his son has never attended public school in his educational career (A238). Respondent also admitted that he never visited any public school placement that the CSE offered the student in the past (A238). Respondent claimed, however, that he would have gone to visit the proposed placement had it been offered prior to the end of the 1998-1999 school year (A236-237). Respondent also testified that by the time he received the proposed placement in early August, he was in California

and plans had already been made for the child for the 1999-2000 school year. Respondent claimed that it was a "moot point" for him to look into the proposed placement (A247).

The head teacher at Gaynor advised that the student's class consists of eight students, all boys, with one teacher and an assistant, opined that the student's IEP was "on target," and claimed that Gaynor is addressing the student's needs and goals as set forth in the IEP. As to the recommended placement's class size, the head teacher noted that it takes the student a long time to warm up to and trust a teacher, and testified "I think 15 children could be a bit overwhelming. It's not too much of a change but I think that just one teacher would be overwhelming" (A263-265, A 273-274).

Gaynor's reading teacher advised that the student has difficulty with reading comprehension, and testified that she provides weekly reading sessions in a group of two. She believes that the student needs small group reading sessions and has benefited from it (A359-361).

Gaynor's speech and language pathologist admitted that she never conducted a speech and language therapy evaluation, nor did she review the speech and language therapy evaluation conducted by the CSE (A351-352). Nonetheless, she testified that the student has expressive and receptive difficulties requiring speech and language therapy services (A348-349).

On April 6, 2001, the IHO issued his Findings of Fact and Decision (App. 16a-38a). In that decision, the IHO found that the Board did not meet its burden of showing that its recommendation was appropriate. In determining that the Board's placement was not appropriate, the IHO found that

the IEP was procedurally defective because the child's actual special education teacher from Gaynor, whose attendance the Board is not empowered to compel, did not attend the child's IEP review meeting held on June 23, 1999, and that the child was not appropriately grouped for math in the recommended MIS-I program. The IHO also determined that Gaynor provided an appropriate program for the student.

Thereafter, the Board appealed the IHO's decision to the State Education Department State Review Officer ("SRO") (A410-428). In that appeal to the SRO, the Board argued that the IHO incorrectly held that the IEP meeting was not properly constituted, that the proposed placement was reasonably calculated to confer educational benefits for the student, and that respondent was not entitled to tuition reimbursement because equitable considerations favor the Board (A421).

The Board argued that as a matter of equity and law, the tuition reimbursement should be denied on the ground that respondent had no intention of placing the student in a public school program, irrespective of its appropriateness (A426). In support, the Board noted that, pursuant to the IDEA, tuition reimbursement was limited to "parents of a child with a disability, who previously received special education and related services under the authority of a public agency" (A426).

The SRO issued a decision granting respondent's request for tuition reimbursement and dismissing the Board's appeal on March 30, 2001 (App. 66a-76a). In doing so, the SRO determined, *inter alia*, that the Board failed to demonstrate that its recommended placement was appropriate.

In reaching that determination, the SRO concluded that the CSE was improperly constituted because it was not comprised of at least "one special education teacher, or where appropriate, at least one special education provider of such child" as provided by 34 C.F.R. § 300.314(a). In interpreting that regulation, the SRO found that the Board had three options in selecting an individual to serve as the student's special education teacher: (1) it could have had the student's private school teacher serve as the special education teacher member of the CSE; (2) the special education teacher on the CSE could have been a special education teacher who would have been likely to implement the student's IEP; or (3) the student's speech/language therapist could have served as the special education teacher member of the CSE. The SRO further asserted that a CSE member designated to serve as a special education teacher must be qualified to provide significant guidance to the CSE about the student's ability to successfully function in the program or programs that the CSE believes may be appropriate prior to the CSE review.

After reviewing the educational evaluator's testimony, the SRO held that "the educational evaluator could not serve as the student's special education teacher on the CSE since she could not provide the kind of knowledge of the student or the recommended program that I must assume was intended by the [IDEA Amendments of 1997] and its regulations" (App. 74a).

Finding that the Board failed to demonstrate the appropriateness of its recommended placement, the SRO did not reach the Board's other challenges to the IHO's findings regarding grouping and mainstreaming. As to the Board's contention that respondent is barred from receiving an award of tuition reimbursement because the student has never

received special education services from a public agency, the SRO denied the Board's challenge and relied on prior decisions which refused to reach the argument. The SRO also noted that, in its view, the record did not demonstrate that respondent failed to cooperate with the CSE.

On July 26, 2001, the Board filed a complaint in the United States District Court for the Southern District of New York, alleging violations of 20 U.S.C. §§ 1400 *et seq.* and challenging the SRO's decision. On March 29, 2002, the Board moved for an order pursuant to FRCP 56(b), granting summary judgment in favor of plaintiff. On June 12, 2002, respondent moved for an order striking a supporting declaration in support of plaintiff's motion for summary judgment as improper under FRCP 56(e), and for an order pursuant to Rule 56(b) of the FRCP, granting summary judgment in favor of defendant. On January 3, 2005, the district court (Daniels, J.) issued a memorandum and order (one paper) granting summary judgment in favor of the Board and dismissing all of respondents' claims (Pet. App. 2-13).

On January 31, 2005, Mr. F. filed a notice of appeal in the United States Court of Appeals for the Second Circuit. After the matter was fully briefed and was calendared for oral argument, the Court of Appeals noted that what appeared to be the dispositive issue was likely to be resolved by the Second Circuit's pending decision in *Frank G. v. Bd. Of Ed. Of Hyde Park* which had previously been argued, and invited the parties to waive oral argument. Consequently, no argument was heard in the instant matter.

On July 27, 2006, the Court of Appeals issued an opinion and order in *Frank G. v. Bd. Of Ed. Of Hyde Park*, and on

August 9, 2006, the Court of Appeals vacated and remanded for further proceedings the judgment of the district court in the instant matter, in light of the opinion and order in *Frank G. v. Bd. Of Ed. Of Hyde Park.*

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Second Circuit would permit parents who have never given the local educational agency an opportunity to provide FAPE to their child to invoke the protections of the same remedy that is available to the parents who have given the public entity a chance to do so. There is no support in the language of the statute or in the legislative history for an interpretation under which a parent could obtain tuition reimbursement without ever trying the public placement.

20 U.S.C. § 1412(a)(10)(C)(ii) was added to the IDEA as part of the 1997 amendments, and authorizes tuition reimbursement to the parents of a disabled child "who previously received special education and related services under the authority of a public agency." The statutory language is clear on its face and should be strictly construed. 20 U.S.C. § 1412(a)(10)(C)(ii) may be properly viewed as establishing a prerequisite for parents to recover tuition reimbursement when enrolling their child in a private school without the consent of the school district. The Court of Appeals' reading of 20 U.S.C. § 1412 (a)(10)(C)(ii) renders the language "previously received special education and related services" a nullity and should be rejected.

By adding a section entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency," the 1997 reauthorization of

the IDEA clarified the circumstances under which tuition reimbursement would be available and the degree of parental cooperation that is required. Through the addition of the language at issue here, Congress restricted the availability of reimbursement and provided that tuition reimbursement for a unilateral parental placement may be available only when the student "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).

The IDEA is not intended to promote its broadest goals at the expense of all other policy considerations. The 1997 amendments to the IDEA reinforced the principle that children should not be unnecessarily removed from regular educational environments. Both the plain language of the statute and the IDEA's legislative history demonstrate Congress's intent that children with disabilities be educated with nonhandicapped children whenever possible, and Congress's intent to restrict the availability of reimbursement for private school tuition. The Court of Appeals erred by failing to consider the IDEA's express purpose of mainstreaming children with disabilities.

Moreover, the language of 20 U.S.C. § 1412 (a)(10)(C)(ii) does not provide clear notice that Congress intended to impose upon the States the economic burden of reimbursing parents for unilaterally placing their children in private schools. The language of statutes derived from Congress's Spending Power must be construed strictly according to the plain meaning of their terms in order to avoid burdening the States with obligations that they did not anticipate. The determination of the Court of Appeals imposes an economic burden, not contemplated by Congress,

upon local schools implementing the IDEA. A rule that permits parents to unilaterally place their children in private schools, and then seek tuition reimbursement from the public entity, stands in contradiction to the plain language of the statute and the intent of Congress.

The Court of Appeals erred in failing to narrowly interpret 20 U.S.C. § 1412(a)(10)(C)(ii) in accordance with the plain language of the statute and the policy considerations underlying its enactment.

ARGUMENT

I. The Plain Language Of 20 U.S.C. § 1412(a)(10)(C)(ii) Should Be Strictly Construed To Preclude Tuition Reimbursement Where The Student Has Not Previously Received Special Education And Related Services From A Public Agency.

Proper respect for the legislative powers vested in Congress implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *United States v. Albertini*, 472 U.S. 675, 680 (1985).

The Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The Court has further recognized that when the statutory language is plain, "the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according

to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)).

The clear meaning of the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from the parent's unilateral placement of the child in private school. The plain language of the statute creates a statutory threshold condition that must be met before the parent becomes eligible for tuition reimbursement.

The 1997 amendments expressly limit the availability of tuition reimbursement to children who received special education services from the public school before their parents enrolled them in private school. Congress could have made explicit in the statutory language of the IDEA that tuition reimbursement would be available to the parent of a child who has never previously received special education and related services from a public agency, but Congress did no such thing.

The Court of Appeals' decision is contrary to the clear intent of Congress. The Court of Appeals' reading of 20 U.S.C. § 1412 (a)(10)(C)(ii) renders the language "previously received special education and related services under the authority of a public agency" a nullity and conflicts with the rule of statutory construction which disfavors interpretations of statutes that render statutory language superfluous. *Connecticut National Bank v. Germain*, *supra*, 503 U.S. at 253.

The holding of the Court of Appeals in *Frank G. v. Board of Education of Hyde Park*, 459 F.3d 356 (2d Cir. 2006), is in direct conflict with the analysis of the First Circuit in *Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004), which correctly recognized that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services while in the public school system.

In contrast, the Second Circuit found that the plain language of the statute, if strictly followed, would lead to an absurd result because a child might have to languish in an inappropriate placement for a "wasted year of actual failure." The Court of Appeals' assumption appears to be premised upon the notion that the public entity is unable to provide an appropriate education in the first place, and is incapable of reaching a speedy determination of the inappropriateness of the public placement where it is, in fact, inappropriate. There is, however, no basis in fact for an assumption that clearly discounts the expertise of school officials who are charged with the responsibility of performing their obligations under the Act.

In interpreting the "previously received" language, the Court of Appeals assumed that the IEP will be inappropriate and will jeopardize the child's health and education. App. 105a. The IDEA does not require that a child would have to be enrolled for any [illegible] period of time in the school district's proposed placement prior to a unilateral private placement. Instead, the statute simply requires that the parent first give the public school's placement a try, which can hardly be characterized as an absurd result.

The Court of Appeals' reading is inconsistent with this Court's recognition that an IEP may not be presumed to be invalid until the parent demonstrates otherwise. *Schaffer v. Weast*, 546 U.S. 49 (2005). In *Schaffer*, the Court noted that the petitioners "in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion. IDEA relies heavily upon the expertise of school districts to meet its goals." *Schaffer*, 126 S. Ct. at 536. We respectfully submit that the Court, following the *Schaffer* decision, should direct courts to presume that public school officials properly perform their responsibilities under the Act, unless it is shown otherwise.

In finding the statutory language ambiguous, the Court of Appeals asserted that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii):

> does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services (emphasis in original).

Frank G. v. Bd. Of Ed. Of Hyde Park, *supra*, 459 F.3d at 368. App. 97a. Nevertheless, that is precisely what the "previously received" language means. It is respectfully submitted that the "previously received" language contains no ambiguity.

Contrary to the Court of Appeals' determination, the language of § 1412(a)(10)(C)(ii) is consistent with the plain

language of § 1412(a)(10)(C)(i), which limits the obligation of the local educational agency to pay for the cost of private school tuition. Read together, those sections demonstrate Congress's clear intent to define and limit the circumstances under which tuition reimbursement would be available. The Court of Appeals also found that it is unclear from the fact that § 1412(a)(10)(C)(ii) provides for parental reimbursement in one circumstance, that it excludes reimbursement in other circumstances. App. 101a. Yet that is exactly the purpose of the limiting language of the section.

The Court of Appeals' departure from a strict reading of the plain language of the statute was also based on an understanding that a district court hearing a challenge to the failure of a local educational agency to provide FAPE is authorized to "grant such relief as [it] determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The Court of Appeals noted that the language of § 1415(e)(2), which *Burlington* relied upon, was unchanged by the 1997 revision of the IDEA and continues to provide that the court "shall grant such relief as the court determined is appropriate" and found the re-enactment of § 1415(e)(2) without change to be "significant because it can be presumed that Congress intended to adopt the construction given to it by the Supreme Court and made that construction part of the enactment" (citations omitted). App. 100a.

Although the language of § 1415(e)(2), recodified as 20 U.S.C. § 1415(i)(2)(C)(iii), was unchanged by the 1997 amendments, the addition of § 1412(a)(10)(C)(ii) as part of the 1997 amendments should properly be viewed as limiting the relief that may be granted pursuant to § 1415(e)(2), which previously existed. To view § 1412(a)(10)(C)(ii) otherwise would render the language "previously received" as

surplusage. The Court of Appeals' reading implies that Congress enacted a provision with no practical effect. This result should be avoided.

Moreover, the Court of Appeals' reading would subvert the intent of Congress to limit the circumstances under which tuition reimbursement would be permitted, and would allow a district court to grant relief in any circumstance. Such a reading would permit a court to ignore the limiting language of the 1997 amendments by permitting a parent to receive tuition reimbursement without ever trying the public school program, which we respectfully submit would produce an absurd result.

The Court of Appeals, having found the statutory language to be ambiguous, also referred to a policy letter prepared by the Department of Education's Office of Special Education & Rehabilitative Services, which the court found to be consistent with its own construction of the statute. A review of that letter, however, reveals that it contains no analysis of the statute. Moreover, as the language of the statute is unambiguous, there is no requirement that such a letter be shown deference.

The Court of Appeals found that "[w]hether 20 U.S.C. § 1412(a)(10)(C)(ii) . . . was intended to eliminate the power of a district court to grant the relief" available under § 1415(e)(2) "involves a question to which the IDEA does not provide an unambiguous answer." If, in fact, an ambiguity exists, then the statute does not provide the "clear notice" required under the spending clause. *See Arlington*, *supra*.

It is respectfully urged, however, that there is no ambiguity. A district court's authority to grant equitable relief

should not extend to include the power to grant relief that is not permitted under the limiting language of § 1412(a)(10)(C)(ii). To permit a district court to do so clearly renders Congress's "previously received" language a nullity. Consequently, in the absence of ambiguous statutory language, a resort to the canons of statutory construction is unwarranted.

II. The Plain Language Interpretation Of 20 U.S.C. § 1412(a)(10)(C)(ii) Which Precludes Tuition Reimbursement Is Consistent With The Legislative History And Policy Considerations Underlying The IDEA's Enactment.

The United States Congress first passed the IDEA as part of the Education of the Handicapped Act in 1970, Public Law 91-230, § 601 *et seq.* (1970). The Education of the Handicapped Act was enacted in response to the perception of Congress that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" House Report No. 94-332, 94th Cong., 1st Sess., at 2. The Court has recognized that the "IDEA was intended to reverse this history of neglect." *Schaffer*, *supra*, 546 U.S. at 52.

In 1974, Congress greatly increased federal funding for the education of the handicapped, and required States receiving those funds to adopt "a goal of providing full educational opportunities to all handicapped children." Public Law 93-380, 88 Stat. 579, 583 (1974). Following a year of study, in 1975 the Education of the Handicapped Act was substantially amended in the Education for All Handicapped Children Act, Public Law 94-142 (1975). The Education for

All Handicapped Children Act guaranteed a free, appropriate public education for children with disabilities. *Board of Education v. Rowley*, *supra*, 458 U.S. at 179.

The IDEA foresees state implementation of federal standards. § 1412(a); *Cedar Rapids Community School Dist. v. Garret F.*, 526 U.S. 66, 68 (1999). As a matter of policy, Congress intended to make public education available to handicapped children with a goal of mainstreaming them into the public educational system. The Court has recognized that, on its face, "the statute evinces a congressional intent to bring previously excluded handicapped children into public education systems of the States." *Board of Education v. Rowley*, *supra*, 458 U.S. at 189.

States that receive funds under the Act must, in order of priority, first provide education to handicapped children who are not receiving an education, and second to the most severely handicapped children who are receiving an inadequate education. 20 U.S.C. § 1412(3). States must also, to the maximum extent appropriate, educate handicapped children with children who are not handicapped. 20 U.S.C. § 1412(5). Recognizing, however, that the nature or severity of some handicaps may be such that education in regular classes cannot be satisfactorily accomplished with the use of supplementary aids and services, the Act provides for the education of some handicapped children in separate classes or institutional settings. 20 U.S.C. §§ 1412(5); 1413(a)(4).

This Court has noted that "[t]he Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms of a public school system,

the system itself monitors the educational progress of the child." *Board of Education v. Rowley*, *supra*, 458 U.S. at 202-203.

The IDEA has historically recognized that some children may have been placed in private school by the public agency, while others are placed unilaterally by their parents. As a result, the IDEA contains a subsection that governs the States' obligations to "Children in Private Schools." 20 U.S.C. § 1412 (a)(10). The statute makes a distinction between children who are placed in or referred to private schools by the public entity and children who are unilaterally placed by the parents. Where the children are placed in or referred to private schools by the public entity, the agency assumes the cost. 20 U.S.C. § 1412(a)(10)(B). Such placement through the public school district is considered a public placement or program. *Burlington*, *supra*, 471 U.S. at 369-370. Where children are unilaterally placed in private schools by their parents, the availability of reimbursement is restricted. 20 U.S.C. § 1412(a)(10)(C)(ii).

In 1985, the Court held that the remedy of tuition reimbursement was authorized under 20 U.S.C. § 1415(e)(2).[8] In *Burlington*, *supra*, 471 U.S. at 369, the Court noted that the Act confers on the reviewing court the authority to receive records of the administrative proceedings and hear additional evidence at the request of a party "and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determined appropriate. § 1415(e)(2)."

In *Burlington*, *supra*, the Court determined that under the narrow circumstance where a parent unilaterally obtains

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[8] Recodified as amended 20 U.S.C. § 1415(i)(2)(C)(iii).

and pays for special education services to which it is ultimately determined the child was entitled, the parent may be entitled to reimbursement, noting that the IDEA "contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children" and also provides for placement in private schools at public expense where this is not possible. *Burlington Sch. Comm. v. Dep't of Educ.*, *supra*, 471 U.S. at 369. *See also Florence County Sch. Dist. Four et al. v. Carter*, *supra*, 510 U.S. at 15. It should be noted that in *Burlington*, the child was already receiving education in the public school system when it was determined that he needed special education and related services. 471 U.S. at 361.

The IDEA sets forth eligibility requirements for States that desire financial assistance under the Act. 20 U.S.C. §§ 1412, 1413. The Act establishes procedures for the identification, evaluation, and educational placement of disabled children and also establishes procedural safeguards to protect disabled children and their parents. §§ 1414, 1415. Among these procedural safeguards is the right of parents to seek remedial relief with regard to their children's education, as well as the court's ability to award such relief as is deemed appropriate. 20 U.S.C. § 1415(i)(2)(C)(iii), formerly codified at 20 U.S.C. § 1415(e)(2).

Reimbursement of private school tuition is limited to situations where it has been determined after a hearing that the services offered by the school district are inadequate or inappropriate, the services chosen by the parents are appropriate, and equitable considerations support the parents' claim. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403(C). Even where tuition reimbursement is

authorized under the IDEA, the parents must show that the school district is incapable of providing FAPE and that the private school placement is proper. *Florence County Sch. Dist. Four et al. v. Carter, supra*, 510 U.S. at 13-15. Those conditions serve the public interest that public funds not be spent to support inappropriate private placements. *See* 64 Fed. Reg. 12602 (March 12, 1999) (discussion of comments to 34 C.F.R. § 300.403(C)).[9]

The statute has continued to evolve according to congressional policy and, accordingly, the IDEA was reauthorized by Congress in 1997. As with other reauthorizations of the statute, the 1997 reauthorization of the IDEA changed prior requirements and added new ones. The Report of the House Committee on Education and the Workforce explained that "[t]he bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities." House Report No. 105-95, 105th Cong., 1st Sess., at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. Those changes serve to define the rights of disabled children and their parents, and the responsibilities of local educational authorities with regard to the education of those children.

Toward that end, the 1997 amendments further clarified the degree of parental cooperation required when it added a

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[9] Several circuits have held that reimbursement for private school tuition was dependent upon the parent cooperating with the school authorities with regard to placement and the child's education plan. *See, e.g., Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523 (6th Cir. 2003). The Second Circuit has held that reimbursement is barred in circumstances where the parents unilaterally arrange for private education services without ever advising the school board that they are dissatisfied with the child's IEP. *M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 68 (2d Cir. 2000).

section entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency."[10] That section opens with a general policy statement that explains that the IDEA "does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i).

The addition of 20 U.S.C. § 1412 to the Act is explained in House Report No. 105-95:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have received special education and related services under the authority of a public agency.

House Report No. 105-95, 105th Cong., 1st Sess., at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90.

The Department of Education's comments to the proposed regulation of the IDEA in the Federal Register

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[10] 20 U.S.C. § 1412(a)(10)(C); *see* House Report No. 105-95, 105th Cong., 1st Sess. at 93, *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. *See Gary S. v. Manchester Sch. Dist.*, 241 F. Supp.2d 111, 114-15 (D.N.H. 2003).

confirm that the bill clarified the responsibilities of the local educational authorities:

> The IDEA Amendments of 1997 added new requirements concerning children placed by their parents in private schools. Section 612(a)(10)(C)(i) provides that an LEA is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the LEA made FAPE available to the child and the parents elected to place the child in the private school.

62 Fed. Reg. 55042 (October 22, 1997).

The 1997 amendments both clarified the circumstances under which tuition reimbursement would be available, and restricted the availability of that remedy by adding language providing that tuition reimbursement for a unilateral parental placement is available when the student "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii). That language was also added to the applicable implementing regulations for IDEA, at the same time. 34 C.F.R. § 300.403(C). 34 C.F.R. § 300.403 states, in relevant part:

> (a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.

> (c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

The Department of Education's interpretative guidance to 34 C.F.R. § 300.403 clarifies that tuition reimbursement is only available on claims "made before a child is removed from a public agency placement." 64 Fed. Reg. 12601 (March 12, 1999).

Thus, the 1997 amendments expressly limit the availability of the tuition remedy to children who received special education services at the public school before their parents enrolled them in private school. The legislative history indicates that this was a limitation that Congress intended to adopt. *See* 34 C.F.R. § 300.403; House Report No. 105-95, 105th Cong., 1st Sess., (1997) *as reprinted in* 1997 U.S.C.C.A.N. 78, 90.

The IDEA's history and the 1997 reauthorization of that statute demonstrate that Congress intended to limit the right of parents of children with disabilities to seek private school reimbursement as a remedy under the statute. The addition of 20 U.S.C. § 1412 (a)(10)(C)(ii) as part of the 1997

reauthorization demonstrates a policy determination, made at the discretion of Congress, to establish a threshold requirement for a claim of tuition reimbursement: that the child had previously received special education and related services from the public entity.

This was accomplished, in part, by the elimination of "inappropriate financial incentives for referring children to special education." It is clear beyond cavil that one specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. *Id.* at 91-92.

The 1997 amendments reinforced the principle that children should not be unnecessarily removed from regular educational environments. 20 U.S.C. § 1412(a)(5)(A). That purpose was recognized by the Court of Appeals for the First Circuit, which noted that the 1997 Amendments "reinforced the principle that children should not be removed unnecessarily from regular education environments, in part by eliminating 'inappropriate financial incentives for referring children to special education .... One specific purpose of the amendments was to control government expenditures for students voluntarily placed in private schools by their parents (citations omitted)." *Greenland School District v. Amy N., supra,* 358 F.3d at 152. *See also* House Report 105-95, 105th Cong., 1st Sess., at 90 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 87.

School districts must be given an opportunity to cure any alleged deficiency. To that end, the IDEA requires notice that special education is an issue in order for parents to bring a claim for tuition reimbursement. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). *Greenland, supra,* 358 F.3d 150;

see also Berger v. Medina City School District, 348 F.3d 513 (6th Cir. 2003) (reimbursement may be reduced or denied where parents did not comply with notice requirements under the IDEA). The Court of Appeals for the First Circuit recognized that those statutory provisions demonstrate Congress's intent that before parents place their child in private school, they must at least give notice to the public entity that special education is at issue. The First Circuit found that this "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided" in the public schools. *Greenland, supra*, 358 F.3d at 160. [11, 12]

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[11] Of course, in the instant case the child was never enrolled in public school and, consequently, the parent did not provide the Board with notice of removal.

[12] The IDEIA or "New IDEA" provisions went into effect in July 2005. 20 U.S.C. § 1415 *et seq*. One of the new provisions specifically calls for a "last chance meeting" between the local educational agency and the parents before the parents seek an impartial due process hearing. The enactment of that provision can only be read as Congress' continuing attempt to address the situation of parents unilaterally withdrawing their children from local public educational agencies without allowing those agencies the opportunity to resolve the parents' complaint. 20 U.S.C. § 1415(f)(1)(B).

The enactment of 20 U.S.C. §§ 1415(f)(3)(E) and 1415 (f)(3)(F), providing that procedural violations in creating an IEP do not *per se* render the IEP legally inadequate and do not constitute a denial of FAPE, further demonstrates Congress's intent to limit the circumstances under which tuition reimbursement may be granted where the child is unilaterally placed in private school by the parent.

Here, the Court of Appeals correctly determined that one express purpose of the IDEA is to ensure that a free appropriate public education is available to all children with disabilities. Having done so, however, the Court of Appeals failed to consider another express purpose of the IDEA, which is to educate handicapped children with nonhandicapped children whenever possible.

The Court of Appeals also ignored the fact that a specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. This Court has noted, for example, that "Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes (citation omitted)." *Schaffer*, *supra*, 126 S.Ct. at 535.

In *Arlington*, *supra*, the Court teaches that the broad, general goal of the IDEA of ensuring that a free appropriate public education is available to all children with disabilities does not trump all other considerations, noting that "[t]he IDEA obviously does not seek to promote those goals at the expense of all other considerations, including fiscal considerations." *Arlington*, *supra*, __ U.S. __, 126 S.Ct. at 2463.

The record shows that the child's proffered public school placement was at a gifted school, the New York City Lower Lab School for Gifted Education, one of the finest schools in the New York City public school system. The record demonstrates, however, that the parent had already predetermined that he was going to reject the public placement by the time it was offered. Thus this case does

not present a situation where a parent removes a child from public school and places the child in private school after trying, but failing, to obtain FAPE. *See* 34 C.F.R. § 300.403. In the absence of a failure to provide FAPE, a remedy under § 1415(i)(2)(C)(iii) is inappropriate, and it is respectfully submitted that it is equally inappropriate to grant relief under that section when such relief should be properly disallowed because of a failure to meet the threshold requirements of §1412(a)(10)(C)(ii).

Public policy does not require that the parents of children who require special education and related services be reimbursed for unilaterally placing those children in private school, where the parent's rejection of the public placement is based upon mere speculation that it is inappropriate. Permitting reimbursement under those circumstances frustrates the policy of mainstreaming disabled children whenever possible, as exemplified by the circumstance of the child in this case, who has never even tried the educational plan developed by the public entity for a single day.

As the IDEA's legislative history demonstrates, Congress intended to limit tuition reimbursement as a remedy under the statute. This was accomplished through the 1997 reauthorization. Indeed, Congress's preference for public education is exemplified by the very language Congress chose in describing its goal: free appropriate *public* education. The Court of Appeals' decision does not further Congress's goal of educating disabled children alongside nonhandicapped children where the public entity is able to do so, and stands in contradiction of Congress's expressed preference for mainstreaming handicapped children. Allowing private

school tuition reimbursement under those circumstances encourages a departure from Congressional policy. Any interpretation of 20 U.S.C. §1412(a)(10)(C)(ii) that would permit tuition reimbursement to parents who have never allowed the public entity a first chance to provide a free appropriate public education to the child is contrary to a major policy consideration underlying Congress's enactment of the IDEA.

III. The Second Circuit's Holding Is In Conflict With The Spending Clause Because A Statute Emanating From Congress's Spending Power Must Provide Clear Notice Of The State's Obligation.

Congress is empowered to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const., Art. I, § 8, cl. 1. Congress has broad power to establish the terms on which it disburses federal money to the States. *See, e.g., South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987). Congress may attach conditions to the receipt of federal funds, and it uses its power to advance policy objectives by conditioning the receipt of federal funds upon the recipient's compliance with statutory and administrative directives. *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980).

When Congress attaches conditions to a State's acceptance of federal funds, those conditions must be unambiguously set out, *Arlington*, *supra*, 126 S. Ct. 2455, because a law "that conditions an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds."

Gebser v. Lago Vista Independent School Dist., 524 U.S. 274 (1998).

The Court has noted:

> The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it.

Pennhurst State Sch. And Hosp. v. Halderman, 451 U.S. 1, 17 (1981). Accordingly, a court must narrowly interpret Spending Clause legislation, so that States are not burdened with unanticipated obligations. *Cedar Rapids Community School District v. Garret F., supra*, 526 U.S. at 84.

The IDEA was enacted by Congress pursuant to the Spending Clause. *See Schaffer, supra*, 546 U.S. at 51. In *Schaffer*, this Court noted that the IDEA is a Spending Clause statute that seeks to ensure that all children with disabilities have available to them a free appropriate public education. The IDEA provides federal funds to assist state and local agencies in the education of children with disabilities, and as a condition for federal financial assistance, States must comply with the extensive goals and procedures of the statute. *Board of Ed. v. Rowley, supra*, 458 U.S. at 179.

In the instant case, the Court of Appeals' decision is inconsistent with this Court's recent decision in *Arlington, supra*. The Court of Appeals left that decision unmentioned

and, indeed, made no mention at all of the Spending Clause. This was error.

As this Court held, the key in a Spending Clause case is "what the States are clearly told regarding the conditions that go along with the acceptance of [IDEA] funds." *Arlington*, *supra*, at 538. Fund recipients may be bound only by those conditions that are voluntarily and knowingly accepted. *See Pennhurst*, *supra*, 451 U.S. at 17. Conditions incident to the receipt of federal funds must be spelled out in the text of the statute in order to be enforceable in court. *Arlington*, *supra*, 126 S.Ct. at 2457-64.

If, in fact, the language of 20 U.S.C. § 1412 (a)(10)(C)(ii) is ambiguous in light of the potential relief available under § 1415(e)(2), that ambiguity defeats any claim that Congress unambiguously conditioned the receipt of federal funds in the manner asserted by respondent. In that case, the statute may be read as having improperly imposed obligations on States receiving federal funds pursuant to the IDEA that were unanticipated by them. An ambiguous statute by definition does not provide clear notice of the States' liability. States could not knowingly accept conditions of which they are unaware or which they are unable to ascertain.

Consequently, it is appropriate to view the IDEA from the perspective of a state official who would decide whether the State should accept IDEA funds and the obligations accompanying the acceptance of those funds. *Arlington*, *supra*. The question here is whether such a state official would clearly understand that one of the obligations imposed by the IDEA is an obligation to reimburse parents who unilaterally place their children in private school when those

children have never previously received special education and related services from the local educational agency.

It is respectfully submitted that no clear notice of such an obligation is provided by the Act. The language of 20 U.S.C. § 1412 (a)(10)(C)(ii) does not even hint that the acceptance of IDEA funds made local educational agencies responsible to reimburse parents for unilaterally placing their children in private schools. The text of 20 U.S.C. § 1412 (a)(10)(C)(ii) fails to provide the clear notice that is required under the Spending Clause to attach such a condition to a State's receipt of IDEA funds.

It is obvious that States could not anticipate having to incur the potentially enormous economic impact of having to reimburse parents who unilaterally placed their disabled children in private schools without having first afforded the local educational agency an opportunity to provide a free appropriate public education, especially where the plain language of the statute provides that the child must have previously received special education and related services from the public entity in order for the parent to be eligible for tuition reimbursement.

Given the magnitude of the potential economic impact upon the States if a parent may unilaterally place a child in private school when the public entity had made available a free appropriate public education, and may seek tuition reimbursement when the child has not previously received special education and related services from the local educational agency, it cannot be presumed that the States would have knowingly and voluntarily accepted such an obligation.

* * *

In sum, the plain language and legislative history demonstrate that Congress did not intend to impose burdens of unspecified proportions and weight upon the States in enacting the IDEA. *See Rowley*, *supra*, 458 U.S. at 176. The statute on its face requires that the child must have previously received special education and related services from the public entity in order for the parent to be eligible to receive tuition reimbursement for the child's private education. Accordingly, the Court should interpret 20 U.S.C. § 1412(a)(10)(C)(ii) in accordance with its plain language and the constitutionally mandated principles of construction applicable to Spending Clause legislation.

CONCLUSION

This Court should reverse the holding of the Second Circuit Court of Appeals that 20 U.S.C. § 1412(a)(10)(C)(ii) of the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency.

Respectfully submitted,

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